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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADAN VASQUEZ, Defendant and Appellant.	H034462 (Santa Clara County Super.Ct.No. CC939324)

Under a negotiated disposition, defendant Adan Vasquez was convicted by no contest plea of driving under the influence of alcohol with three prior convictions and driving while his privilege to drive was suspended or revoked for refusal to take a chemical test or for driving with a blood-alcohol level of .08 percent or greater with three prior convictions. He was granted probation and ordered to serve one year in the county jail. At sentencing, the court ordered him to pay $100 in attorney fees under Penal Code section 987.8.[1] On appeal, defendant contends the court erred by imposing this fee without determining his ability to pay it. He also contends that the minute order erroneously imposed a $20 lab fee not imposed by the court and that the court erroneously neglected to dismiss one count as part of the negotiated disposition. Finding merit in defendant's claims, we modify the judgment and direct the trial court on remand to dismiss the remaining count, consistently with the negotiated disposition.

[1] Further statutory references are to the Penal Code unless otherwise stated.

STATEMENT OF THE CASE[2]

On April 8, 2009, defendant was charged by complaint with driving under the influence of alcohol with three or more prior convictions in violation of Vehicle Code sections 23152/23550, subdivision (a) (count 1); driving with a blood alcohol level of .08 percent or greater with three prior convictions in violation of Vehicle Code sections 23152/23550, subdivision (a) (count 2); driving while the privilege to drive was suspended or revoked for refusal to take a chemical test or for driving with a blood alcohol level of .08 percent or more with two prior convictions for the same offense in violation of Vehicle Code section 14601.5, subdivision (a) with two prior convictions for the same offense (count 3); and driving while the privilege to drive was suspended or revoked because of a DUI conviction in violation of Vehicle Code section 14601.2, subdivision (a) (count 4).

Under a negotiated disposition, defendant pleaded no contest to counts 1 and 3 and admitted three prior convictions for driving under the influence. Under section 1385, the court struck the allegations concerning two prior convictions for driving on a suspended license and submitted counts 2 and 4 for dismissal at sentencing. Consistently with the plea bargain, at sentencing, the court suspended imposition of sentence and placed defendant on three years formal probation with conditions that included that he serve one year in the county jail. The court referred defendant to the Department of Revenue for a determination of his ability to pay fines and fees, but the court actually imposed various fines and fees, including $100 in attorney fees. Not among the fines or fees imposed was a $20 lab fee, though the minute order provides for this. The court dismissed "the remaining charge, Count 2" under the negotiated disposition. No mention was made of

[2] The record contains none of the facts giving rise to the charges as defendant waived a full probation report. We accordingly do not include them. The facts are not material to the issues on appeal in any event.

count 4, which the record shows was also to be dismissed at sentencing under the plea bargain, though the minute order reflects this dismissal as well.

Defendant timely appealed based on the sentence or other matters occurring after the plea.

DISCUSSION

I. *The Order Directing Payment of Attorney Fees Was Erroneous*

Defendant contends that, contrary to the requirements of section 987.8, subdivision (e), the court failed to make a determination that he had the ability to pay attorney fees before directing that he pay a fee of $100. He further contends that any implied finding of ability to pay is not supported by sufficient evidence in the record. The People contend on the other hand that the court's order was subject to the Department of Revenue's determination that defendant had the ability to pay, thus complying with the statute. On this record, defendant has the better argument.

Section 987.8, subdivision (b) provides in relevant part: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided" Further, "[i]f the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county." (§ 987.8, subd. (e).)

Under section 987.8, subdivision (g)(2), " '[a]bility to pay' means the overall capability of the defendant to reimburse the costs or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's

reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable financial position. . . . [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

The court's finding of the defendant's present ability to pay need not be express, but may be implied through the content and conduct of the hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71.) But any finding of ability to pay must be supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

We read section 987.8, subdivision (b), as expressly requiring a finding—whether express or implied—by the court of a defendant's ability to pay as a precondition to an order assessing attorney fees—an order that is not mandatory. Here, there is nothing in the record addressing the issue of defendant's ability to pay, other than the referral to the Department of Revenue, which sheds no light on the issue. Accordingly, there is no finding of his ability to pay. And even if there were such a finding, it would not be supported by substantial evidence in the record. There is no evidence in the record of defendant's assets, employment status, or other means of income. And when the fee was imposed, he was about to serve a jail term exceeding six months and he was ordered to pay other fines and fees exceeding $2,000.

Furthermore, we reject the People's contention that the order was proper because it was impliedly conditioned on a subsequent finding by the Department of Revenue of defendant's ability to pay. Although before imposing the fee, the court referred defendant to the Department for an ability-to-pay determination, the court's order directing payment of attorney fees was not ultimately conditional. It plainly assessed fees

without the required determination by the court under section 987.8, subdivision (e) of defendant's ability to pay them, notwithstanding that under the statute, the court may make a referral for a departmental ability-to-pay inquiry.

We conclude that the record fails to disclose a required finding by the court of defendant's ability to pay attorney fees. Even if a finding could be implied, there is no substantial evidence in the record to support it. Accordingly, the attorney fee assessment cannot stand. This leaves only the question of the remedy for the error. Defendant urges us to strike the order while the People contend that the matter should be remanded for a proper hearing on attorney fees. But the $100 fee imposed here is de minimis. In the interests of judicial economy, we will strike the fee rather than remand for further proceedings the cost of which would far exceed $100. (*People v. Phillips*, *supra*, 25 Cal.App.4th at p. 76 [noting section 987.8's purpose to "conserve the public fisc" and that to require additional hearings would cost "additional public funds"].)

II. *The $20 Lab Fee Should Also be Stricken*

Defendant contends, and the People agree, that the $20 lab fee reflected in the minutes was never imposed by the court and should be stricken. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 ["The record of the oral pronouncement of the court controls over the clerk's minute order"].) We accordingly strike the fee and direct on remand that the minutes be corrected to reflect this.

III. *Count 4 Should Have Been Dismissed*

Defendant finally contends, and the People agree, that the dismissal of count 4 was part of the negotiated plea and remains to be dismissed by the court in accordance with that agreed upon disposition. The entire record makes clear that this is the case. That count 4 was not actually dismissed at sentencing along with count 2 was oversight. But because it is the oral pronouncement of judgment that controls, we will treat the clerk's minutes reflecting the dismissal of count 4 as clerical error and direct on remand that the

minutes be corrected to omit this dismissal. We will further direct the court on remand to modify the judgment by dismissing count 4 as contemplated by the plea bargain.

DISPOSITION

The order directing defendant to pay $100 in attorney fees is stricken. The $20 lab fee is also stricken. On remand, the clerk is directed to correct the minutes to reflect that at sentencing, the court neglected to dismiss count 4 of the complaint; the court is further directed on remand to modify the judgment by formally entering the dismissal of count 4. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications.[3]

Duffy, J.

WE CONCUR:

Rushing, P.J.

Premo, J.

[3] The abstract of judgment is not included in the record but we assume that as originally prepared, it does not reflect the modifications to the judgment we have hereby directed.